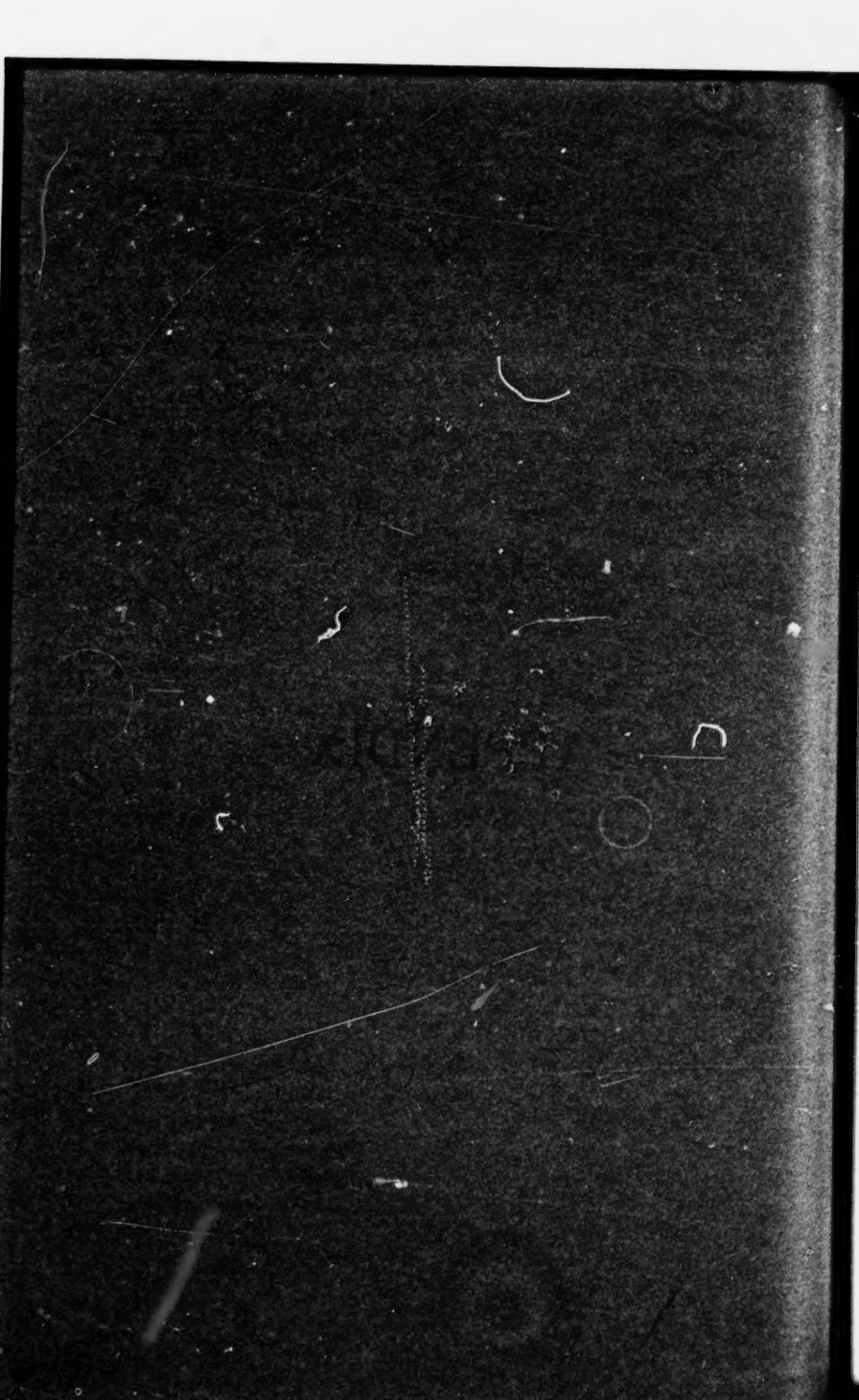

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

A. J. BURNHAM, et al.,
Plaintiffs,

vs.

THE DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF GEORGIA, et al.,
Defendants.

CIVIL ACTION
NO. 16385

ORDER ON MOTIONS TO DISMISS

In this class action plaintiffs request injunctive and declaratory relief pursuant to the provisions of 42 U.S.C. § 1981, 1983 and 28 U.S.C. § 1343(3) & (4). The parties-plaintiff, residents of Georgia, are all now or have been patients at one or more of the mental health institutions operated by the Department of Public Health of the State of Georgia (hereinafter "the Department"). The defendants are State officials responsible for the operation of such institutions, in varying degrees, and include the 18 member Board of Health which directs and controls the Department, the Director and Deputy Director of the Department, the Director of the Division of Mental Health and the Director of Institutions, Division of Mental Health. Also included as defendants are six superintendent/directors of individual institutions and two Judges of the Court of Ordinary.

The gravamen of the complaint is that the defendants are providing *constitutionally* inadequate diagnosis, care, and treatment to the plaintiffs and all those similarly situated. Additionally it is asserted that persons, as yet unknown, will be committed by the Judges of the Court of Ordinary to what amounts to penal or custodial status without the benefit of due process of law.[1]

The plaintiffs' prayer asks this Court to declare (1) that patients confined to any state-owned or operated hospital or facility utilized for the diagnosis, care and treatment of mentally ill or mentally retarded persons are *constitutionally* entitled to adequate and effective treatment and (2) that each of the six institutions named in the complaint is unfit to provide *constitutionally* adequate and effective treatment for patients confined therein. Futher, plaintiffs urge this Court to order the appropriate parties-defendant to provide *constitutionally* adequate treatment for any patient confined to the six named institutions, or to any other state-owned or operated facility. Plaintiffs also seek an injunction (1) preventing the defendants from operating any of the six named institutions in a manner that does not conform to the *constitutionally* required standards for diagnosis, care and treatment of mentally ill or mentally retarded persons and (2) prohibiting the named Judges of the Court of Ordinary and "members of their class" from committing any person to any of the six named institutions or any other state-owned or operated facility until such time as such institution or facility has made provisions for *constitutionally* adequate diagnosis, care, and treatment of patients.

[1]Plaintiffs do not directly or indirectly attack the commitment procedures of the State of Georgia. This particular assertion is nowhere explained or argued in plaintiffs' brief of law and argumentation.

Lastly, plaintiffs ask this Court to order the appropriate defendants to prepare a comprehensive, *constitutionally* acceptable plan to provide adequate and effective treatment for all patients confined to state mental health facilities.

Prior to an examination of this case on its merits this Court deems some preliminary discussion appropriate. This Court is understandably concerned with the condition of that lamentably increasing number of human beings confined to mental health institutions. Certainly on moral grounds the proposition that the nation's mentally ill should be provided the best possible diagnosis, care and treatment is commendable. As citizens, we should be proud of any efforts to so provide for the needs of our fellow man. Those efforts include the enactment in 1969 by the Georgia General Assembly of legislation that has been heralded as one of the most advanced statutory treatments of the subject of hospitalization of the mentally ill in this nation. *See* Ga. Laws 1969, pp. 505-545; Ga. Code Ann., Chap. 88-5. The commitment to progress in the area of care for the mentally ill in Georgia is reflected in the increase from approximately $13,000,000.00 in 1960 to the $90,000,000.00 level in 1972 of funds provided by the General Assembly for the care of the mentally ill. Efforts have also been undertaken to decentralize and establish regional hospitals throughout the State by means of an extensive building program. Against this backdrop of effort, the Court considers the legal aspects of this matter.[2]

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[2]This petition and the defendants' motions present novel questions of law. Counsel for both sides have submitted excellent presentations of their respective position. They are to be commended for their efforts and assistance to the Court.

JURISDICTION PURSUANT TO 28 U.S.C. § 1343

The defendants assert that the complaint should be dismissed for want of jurisdiction over the subject matter in that it fails to raise a substantial federal question.

The courts have generally taken the view that 42 U.S.C. § 1983[3] establishes the substantive right under which a complaintant may proceed to vindicate a violation of his civil rights. Jurisdiction has been granted pursuant to 28 U.S.C. § 1343 (3) to allow consideration of the alleged claim arising under 42 U.S.C. § 1983. *Baldwin v. Morgan,* 251 F.2d 780 (5th Cir. 1958). Germane to both 28 U.S.C. § 1343 and 42 U.S.C. § 1983 is the requirement that the conduct complained of be exercised "under color" of state law. The courts, when considering claims under the two aforementioned sections have established the following two prerequisites: (1) that the defendant(s) act "under color" of state or local law *and* (2) that the plaintiff be subjected to a deprivation of some rights, privileges, or immunities secured by the constitution and laws of the United States. *United States v. Classic,* 313 U.S. 299 (1941); *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1965); *Stringer v. Dilger,* 313 F.2d 536 (10th Cir. 1963); *Marshall v. Sawyer,* 301 F.2d 639 (9th Cir. 1962).

The plaintiff's complaint in the instant case is predicated squarely upon the proposition that the "adequacy" of the diagnosis, care, and treatment of patients in Georgia's mental health institutions is not merely a matter of State law[4] but is a *federal constitutional* issue. Indeed

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[3]The jurisdictional considerations applicable to 42 U.S.C. § 1983 apply with equal force to 42 U.S.C. § 1981.

[4]See Ga. Laws 1969, pp. 505-545, the majority of which is set forth in Chapter 88-5, Ga. Code Ann.

under the second prerequisite noted above the plaintiffs are required to show a deprivation of a *federal* right in order to invoke jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. This Court is in agreement with plaintiff's counsel when he states, "It is true that in dealing with this issue, we are somewhat in the forefront of the law . . ."[5], to the extent that a right to treatment for the mentally ill (if such a right indeed exists absent a statutory mandate) is a constitutionally required right.

As pointed out by the defendants, whether a State shall provide a particular governmental service, and if so in what amount (both qualitatively and quantitatively) are generally questions which address themselves exclusively to State law and do not raise federal constitutional issues. *See Fullington v. Shea,* 320 F.Supp. 500 (D. Colo. 1970) (3 judge court), aff'd., 404 U.S. 963 (1970). *Cf. McGowan v. Maryland,* 366 U.S. 420 (1961). In the matter now before the Court there is a law of the State of Georgia which requires treatment of those individuals confined to the State's mental health institutions.[6] The argument herein is not that there is some sort of invidious discrimination based upon race or similarly prohibited criteria being practiced whereby an unequal distribution or application of the benefits of this State law is being rendered. Plaintiffs are directly challenging the "adequacy" of the treatment, care, and diagnosis being provided in the State's mental health institutions.[7]

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[5]Brief of Plaintiffs in Opposition to Defendants' Motions to Dismiss, p. 3.

[6]See Ga. Code Ann. § 88-502.2.

[7]Plaintiffs do not assert that "treatment" is not being provided in the Georgia mental health facilities, but that the "adequacy" (i.e. quality, quantity, individualization, and level) of treatment is

The plaintiffs urge this Court, therefore, to declare the existence of a *federal constitutional* right to treatment (to encompass "care" and "diagnosis") for the mentally ill and to define the same. This Court can find no legel precedent for such a declaration and to the contrary finds persuasive authority compelling an opposite conclusion.[8]

The leading exponent of the declaration of a right to treatment for the mentally ill is Morton Birnbaum, M.D., LL.B., who for the past fifteen years has written a number of articles on the subject and has been instrumental in "law reform" litigation. Dr. Birnbaum himself has conceded that while such a right to treatment has been accepted by society, it has not been recognized as a federal constitutional right.[9]

Not every governmental function results in an individual right. See *Collins v. Hardyman,* 341 U.S. 651 (1951); *Niklaus v. Simmons,* 196 F.Supp. 691 (D. Neb. 1961). Looking at an analogous area of recent great societal concern and importance, education, we find some instructive authority. In *Flemming v. Adams,* 377 F.2d 975, 977 (10th Cir. 1967), *cert. denied,* 389 U.S. 898

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deficient and that said "adequate treatment" is mandated by the constitution of the United States. There does exist a dispute between counsel as to whether mere custodial care constitutes "treatment" (as required by the State law). That issue is more appropriately for the courts of Georgia to resolve. See *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 640-641 (1959).

[8]For a comprehensive discussion of the "right to treatment" for the mentally ill, see Symposium: The Right to Treatment, 57 Georgetown L.J. 673 (1969).

[9]See Birnbaum, "The Right to Treatment — Some Comments on Certain Legal Developments" (Statement of November 4, 1969 before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate).

(1967), a claim that the right to a public education was secured by the United States Constitution was rejected as follows:

> "Although the importance of education to our democratic society is obvious to all . . . we do not agree that the right to an education is among those rights guaranteed by the federal constitution."

See Peacock v. Rigsbee, 309 F.Supp. 542 (N.D. Ga. 1970). While the 14th Amendment guarantees equal protection of the laws, its does not create any new rights in itself.

With the exception of a recent Alabama decision discussed herein below, the courts have not gone beyond recognizing a *statutory* right to treatment in those jurisdictions where such a right exists. The Court of Appeals for the District of Columbia, in a series of split decisions, has held that under federal statutes regulating the hospitalization of the mentally ill in Washington, D.C., (tantamount to state laws in the District) patients there can obtain judicial review of the adequacy of their treatment, including the question of whether the least restrictive course of treatment available is being utilized. *See Covington v. Harris,* 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1963); *Lake v. Cameron,* 364 F.2d 657 (D.C. Cir. 1966).

Chief Judge Bazelon indicates by way of dicta in *Rouse v. Cameron,* supra, that the lack of psychiatric treatment beyond custodial care raises serious constitutional questions. These "constitutional questions" were not reached due to the finding of the court that Congress had provided for a *statutory* right to treatment (D.C. Code § 21-562, Supp.V, 1966). *See Rouse v. Cameron, supra* at 453.

Rouse arose on a petition for habeas corpus challenging involuntary confinement in a mental hospital on being automatically committed under a D.C. statute providing for same on being acquitted of an offense by reason of insanity. *See Dobson v. Cameron,* 383 F.2d 519, 523 (D.C. Cir. 1967) (concurring opinion). Moreover, the majority opinion stressed that, "The purpose of involuntary hospitalization is treatment, not punishment." *Rouse v. Cameron, supra* at 452.

It is important to note that an articulate minority of the Disrict of Columbia Court of Appeals does not agree that the *statute* makes it proper for courts to go into such matters of "adequacy" and the evaluation of alternative courses of treatment. Judge Warren E. Burger stated in *Lake v. Cameron, supra* at 663:

> ". . . this Court now orders the District Court to perform functions normally reserved to social agencies by commanding search for a judicially approved course of treatment or custodial care for this mentally ill person who is plainly unable to care for herself. Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved."

See also Dobson v. Cameron, 383 F.2d 519, 523 (D.C. Cir. 1967).

In the instant case we are presented with no *federal* statute mandating treatment as was the basis for relief in the District of Columbia cases cited hereinabove. What we do have is simply a *Georgia* statute which provides:

> "Right to care and treatment. — The policy of the State is that no person shall be denied care and treatment of mental disorder, and no services shall be delayed at a facility of the State or a political sub-

> division of the State because of inability to pay." Ga. Code § 88-502.2.

Even the Georgia act differs from the District of Columbia act in that the Court in *Rouse v. Cameron, supra,* construed that statute to predicate involuntary confinement solely on the premise that treatment would be afforded. This Georgia law, however, recognizes other grounds for involuntary committal:

> "Criteria for nonobjecting or involuntary hospitalization. — A person being within the State may be hospitalized under sections 88-506.2 through 88-506.7 if he is mentally ill and is (a) *likely to injure himself or others if not hospitalized* or (b) incapable of caring for his physical health and safety." [Emphasis added] Ga. Code § 88-506.1.[10]

This Court is of the oninion that plaintiffs have failed to demonstrate or sufficiently allege the deprivation of a *federally* protected right. Since plaintiffs have not been deprived of any federal right, they cannot maintain this action pursuant to 42 U.S.C. § 1981 & 1983 and 28 U.S.C. § 1343(3) & (4). *See City of Greenwood, Miss. v. Peacock,* 384 U.S. 808 (1966); *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1965); *Stringer v. Dilger,* 313 F.2d 536

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[10]Plaintiffs' counsel asserts that he "cannot believe that defendants' counsel is serious in his discussion . . . about the justification for civil commitment being primarily avoidance of injury to themselves and others. If this were so there would be no need to even amuse ourselves with the little game of calling these institutions hospitals." Apparently plaintiffs' counsel believes that the *sole* justification for confining mentally ill individuals is to treat them. While this is perhaps a noble, even desirable, viewpoint it totally ignores the realities of the situation. Those realities are reflected in the same Georgia law that in fact provides for a right to treatment but predicates the attendant confinement on the basis of protection of society and protection of the individual from himself and others.

(10th Cir. 1963); *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962).

This Court takes notice of Chief Judge Johnson's rulings in the Middle District of Alabama. *See Wyatt v. Stickney*, 334 F.Supp. 1341 (M.D. Ala. 1971); *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971). This Court respectfully disagrees with the conclusion reached by that court in finding an affirmative federal right to treatment absent a statute so requiring. Judge Johnson relied solely for authority on *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967) and *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) both of which were predicated upon the local District of Columbia statute. The factual context in those Alabama decisions (budgetary cuts by the State legislature causing further deterioration of an existing deficient institutional environment) is also substantially different from the existent situation in the Georgia mental health institutions.

LACK OF JURISDICTION COMPELLED BY ELEVENTH AMENDMENT

Plaintiffs correctly argue that in suits against State officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). The Court is also aware that States have been forced to assume financial burdens in other cases involving the deprivation of constitutionally protected rights. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (1969). However, in the instant case there has been no showing of a denial of a *constitutionally* protected right

nor a *federally* guaranteed statutory right.

In the case at bar the Court will not require the State of Georgia to expend additional revenues for the diagnosis, care, and treatment of patients in its mental health institutions, said treatment and care being mandated by *State* law. To place such a requirement upon the State, under the circumstance wherein citizens of the State have brought action in federal court, would be in contravention of the Eleventh Amendment to the United States Constitution. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Reid*, 322 U.S. 47 (1944); *Worchester County Trust Co. v. Controller of California*, 302 U.S. 292 (1937); *Hans v. Louisiana*, 134 U.S. 1 (1890); *In Re Ayres*, 123 U. S. 443 (1887); *Scott v. Board of Supervisors of Louisiana State Univ.*, 336 F.2d 557 (5th Cir. 1964). For the above-stated reason this Court finds that a conclusion as to the lack of jurisdiction over the person of named defendants is also compelled by the Eleventh Amendment to the United States Constitution.

FAILURE TO PRESENT A JUSTICIABLE ISSUE

The question of justiciability has two facets. "First, we must decide whether the claim presented and relief sought are of the type which admit of judicial resolution." *Powell v. McCormack*, 395 U.S. 486, 516-517 (1969). That is, the Court must determine whether "the duty asserted can be judicially identified and its breach judicially defined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962). Secondly, justiciability requires a determination of whether the structure of the Federal Government renders the issue presented a "political question".

For the purposes of this case the Court will focus its inquiry into whether the plaintiffs' claim and requested relief provide such reasonably specific, judicially ascertainable and manageable standards as are required for a controversy to be justiciable within the context of the above definition.

Plaintiffs' basic claim is that mental health patients are constitutionally entitled to something more than custodial care and treatment. Plaintiffs assert that said patients are entitled to "adequate and effective treatment", "constitutionally adequate treatment" or adequate "diagnosis, care and treatment." This Court must therefore determine whether "adequate and effective treatment", "constitutionally adequate treatment", and adequate "diagnosis, care and treatment" can "be judicially identified and its breach judicially defined, and whether protection for the right asserted can be judicially molded". *Baker v. Carr, supra* at 198. No simple solution to such a task is available, hence the need for the following analysis.

Common to each of the plaintiffs' characterizations of the alleged "right" involved is the word "treatment". The dictionary provides meager assistance to the Court in attempting to "judicially identify" the duty asserted or "judicially define" what the breach of that duty would be, to wit:

> "treatment: 1. the action or manner of treating as:
> a: conduct or behavior towards another party
> . . . b: the action or manner of treating a patient medically or surgically."
> Webster's Third New International Dictionary (unabridged 1961).

Experts in the field of mental illness are also of little help other than in providing analogous terminology, e.g. "ther-

apy". Defendants cite the following comments by Dr. Thomas S. Szasy (Professor of Psychiatry, State Univ. of N.Y.) in his article "The Right to Psychiatric Treatment: Rhetoric and Reality", 57 Georgetown Law Journal 740, 741 (1969) as indicative of the problem:

> "Levine [M. Levine, Psychotherapy in Medical Practice 17-19 (1942)] lists 40 methods of psychotherapy. Among these, he includes physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs and electricity, and brain surgery. *Obviously the term 'psychiatric treatment' covers everything that may be done under medical auspices — and more.*
>
> If mental treatment is all the things Levine and others tell us it is, how are we to determine whether or not patients in mental hospitals receive adequate amounts of it?" [Emphasis added]

In *Greenwood v. United States*, 350 U.S. 366, 375 (1955), the Supreme Court also noted the transiency of the field when reviewing the testimony of two court-appointed psychiatrists, declaring:

> ". . . their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ."

The addition of qualifying and modifying language such as "adequate" or "constitutionally adequate" to a word

of uncertain meaning like "treatment" does nothing to clarify the confusion but serves only to compound it. It is therefore the opinion of this Court that the claimed "duty" (i.e. to "adequately" or "constitutionally treat") defies judicial identity and therefore prohibits its breach from being judicially defined.[11] The problem of mental illness is a matter of urgent social concern. The members of the community should be made aware of the existent problems and should work through their elected representatives to solve those problems. This Court, however, is not the appropriate vehicle for the stimulation of public awareness. In attempting to grapple with issues beyond the pale of judicial definition and resolution the Court renders a disservice to the community and stifles the needed creative and imaginative efforts of its concerned individual citizens.

ADEQUATE REMEDIES AT LAW AVAILABLE TO PLAINTIFFS

The resolution of this issue involves a consideration of additional conflicting positions arising in the respective arguments of counsel. It is the opinion of this Court that there exists multiple adequate remedies at law available to the plaintiffs on an *individual* basis through which redress may be obtained. In such a situation the prayer for injunctive relief must be denied and the claim dismissed. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500

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[11]Plaintiffs' counsel asserts in brief of law: "Plaintiffs believe that the custodial care that exists will be found to be the result of the 'justiciable issue' of inaction after incarceration on the part of the State officials". Such "justiciable issues" would more appropriably be raised in an action in State court under the applicable Georgia law. (Right to treatment. — Ga. Code Ann. § 88-502.2;-502.3; Medical malpractice — Ga. Code Ann. § 84-924.)

(1959); *cf. Carson v. City of Fort Lauderdale*, 293 F.2d 337 (5th Cir. 1961).

Plaintiffs state that a class action procedure is unavailable under Georgia law since the analogous federal rule (Rule 23, F.R.Civ.P.) has a subsection (3) under Rule 23(a) whereas the Georgia law does not. However, the Supreme Court of Georgia in *Georgia Investment Co. d/b/a Dixie Loan Co. v. Norman*, No. 27146, decided May 3, 1972, has declared that under section 23 of the Civil Practice Act (Ga. Code Ann. § 81A-123), a class action may be filed where the character of the right sought to be enforced is common, although such right is neither joint, nor derivative, nor several and the object of the litigation is not the adjudication of claims which do or may affect specific property involved in the action. Plaintiffs assert that the remedies of habeas corpus, medical malpractice, and ordinary tort actions would not function to provide an adequate remedy in that the wrong sought to be remedied affects the system of care and treatment as a whole and not on an individual basis; that individual action could not affect the entire scheme of treatment. The Court finds such a description inconsistent with plaintiffs argument that each individual patient should have his particular therapy or treatment personalized. The Court believes that any meaningful attempt to ascertain whether "treatment" or "adequate care and treatment" is being afforded patients is best determined by the courts of the State of Georgia applying the applicable State law on an individual basis.[12] As argued by defendants, ". . . [T]he question of what in detail constitutes 'adequate treatment'

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[12]This is assuming the State courts can define "treatment" and determine its adequacy as mandated by Ga. Code Ann. § 88-502.2;-502.3.

is simply not capable of being spelled out as a mathematical formula which could be applied to and would be beneficial for all patients. Everyone knows that what might be good treatment for one patient could be bad or even fatal for another."

Since each patient is an individual and what is good treatment for one might mean disaster for another, the only feasible way in which the adequacy of treatment could ever be measured is against the needs of a particular patient. Under these circumstances it is the opinion of this Court that the class action requisites of Rule 23 are not met in that (1) there would be relatively few questions of law or fact common to members of the alleged class, (2) the claims of the plaintiffs would not be typical of the claims of the class, and (3) plaintiffs are not necessarily representative of or in a position to adequately protect the interests of the class. *See Hamer v. Campbell,* 358 F.2d 215 (5th Cir. 1966); *Wilson v. Kelley,* 294 F.Supp. 1005 (N.D. Ga. 1968), *aff'd,* 393 U.S. 266 (1968).

The Court is persuaded that some matters are left for legislative and executive resolution short of federal judicial review. All too often, an instance of judicial overreach can result in a reduction of government services to a minimal level for fear of subsequent accountability for some innovative beneficial program. The rigidity of the court process can often stifle intelligent experimentation in dealing effectively with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced. It is beyond the technical expertise of this, and presumably most, judges to endeavor to administer a state-wide mental health program and its direction is best left to the enlightened direction of the elected representatives of the people. It is true that

federal courts have been drawn into administrative rules in other areas, the worth of which efforts have ultimately to be judged. However, in those instances it has followed the clear mandate of the Congress or the clear declaration of a federal constitutional right by our highest court, neither of which is present here.

For the reasons stated, the motion to dismiss must be granted and the petition is, therefore, dismissed.

IT IS SO ORDERED.

This the 3rd day of August, 1972.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

A. J. BURNHAM, Edith Summerhall, Christopher C. Nelson, William J. Kelly, Ray Gormley, Julium McLendon, and David P. Thompson, Jr., for themselves jointly and severally and for all others similarly situated, Plaintiffs-Appellants,

v.

The DEPARTMENT OF PUBLIC HEALTH OF the STATE OF GEORGIA et al., Defendants-Appellees.

No. 72-3110.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1974.

Appeal from the United States District Court for the Northern District of Georgia, Sidney O. Smith, Jr., Chief Judge.

Before WISDOM, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

The decision of the district court is reversed on the authority of our decisions in Donaldson v. O'Connor, 5 Cir. 1974, 493 F.2d 507, and Wyatt v. Aderholt, 5 Cir. 1974, ____ F.2d ____. The case is remanded to the district court for further proceedings consistent with the principles announced in those decisions.

Reversed and remanded.

Ricky WYATT, By and Through his aunt and legal guardian Mrs. W. C. Rawlins, Jr., et al., etc., Plaintiffs-Appellees,

v.

Charles ADERHOLT, as Commissioner of Mental Health, et al., Defendants,

The Alabama Mental Health Board, an Agency of the State of Alabama, and George C. Wallace, as Governor of Ala., Defendants-Appellants.

No. 72–2634.

United States Court of Appeals, Fifth Circuit.

Nov. 8, 1974.

Appeals from the United States District Court for the Middle District of Alabama.

Before WISDOM, BELL and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge:

In this case, we must decide whether federal district courts have the power to order state mental institutions to provide minimum levels of psychiatric care and treatment[1] to persons civilly committed to the institutions.

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[1]"Treatment" means care provided by mental health professionals and others that is adequate and appropriate for the needs of the mentally impaired inmate. Treatment also encompasses a humane physical and psychological environment. The term "habilitation", used by the parties and amici in the district court and by the district

The guardians of patients civilly committed to three Alabama facilities for the mentally handicapped brought this class action on behalf of their wards and other civilly committed patients at those institutions. The Honorable Frank M. Johnson, trial judge, held that mentally ill patients "have a constitutional right to receive such individual treatment as will give each of them a reasonable opportunity to be cured or to improve his or her mental condition". Wyatt v. Stickney, M.D.Ala. 1971, 325 F.Supp. 781, 784. In a later order, Judge Johnson held that the mentally retarded patients have a constitutional right to "such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society". Wyatt v. Stickney, M.D.Ala.1972, 344 F.Supp. 387, 390. The district court found that conditions at the three facilities deprived the plaintiffs of these constitutional rights, and ordered the defendants-appellants, Alabama officials responsible for the administration of the state's mental health programs, to implement a detailed set of standards designed to ensure the provision of minimally adequate treatment and habilitation at the institutions. From this order, the Alabama Mental Health Board and Alabama's Governor George C. Wallace bring separate appeals.

Together, the Mental Health Board and the Governor advance six major contentions on appeal. They contend

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court in is order of April 13, 1972 (Partlow State School and Hospital) is a term used to describe that treatment which is appropriate to the condition of the mental retardate. For convenience, in this opinion we group "habilitation" and "treatment" under the single term "treatment", and to include those instances where rehabilitation is impossible in which event the requirement is minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary. Donaldson v. O'Connor, 5 Cir., 1974, 493 F.2d 507, 522.

(1) that the district court erred in holding that civilly committed mental patients have a constitutional right to treatment; (2) that the court lacked jurisdiction because the suit was in effect a suit against the state proscribed by the eleventh amendment; (3) that the case involves rights and duties not susceptible to determination by judicially ascertainable and manageable standards, and therefore presents a non-justiciable controversy; (4) that the order of the district court invades a province of decisionmaking exclusively reserved to the state legislature; (5) that the plaintiffs were not entitled to equitable relief because they had adequate remedies at law to protect the rights they asserted; and (6) that the district court erred in awarding plaintiffs a reasonable attorneys' fee.

Neither in the district court nor on appeal to this Court have the defendants challenged the detailed set of standards articulated by the district court. They have conceded that if there is a constitutional right to treatment enforceable by a suit for injunctive relief in federal court, those standards accurately reflect what would be required to ensure the provision of adequate treatment.

I.

A. *The proceedings below*

This case began innocuously enough, when a cut in the Alabama cigarette tax forced the state to fire 99 professional, subprofessional, and intern employees[2] at the

[2]The 99 employees included 41 who were assigned duties such as food service, maintenance, typing and other mechanical duties not involving direct patient care; 26 persons involved in planning social and other recreational activities for the patients; nine persons from the department of psychology; eleven from the social service department; three registered nurses, two physicians, one dentist, and six dental aides.

Bryce Hospital, a state-run institution for the mentally ill at Tuscaloosa. The plaintiffs filed their complaint October 23, 1970. The complaint named two classes as plaintiffs. One, represented by Ricky Wyatt and two other named plaintiffs, appellees here, consisted of the patients at Bryce. The other, represented by five of the then recently terminated employees, consisted of the employees who had been dismissed for budgetary reasons. The defendants were Stonewall B. Stickney, then Executive Officer of the Alabama State Mental Health Board; Dr. John V. Hottel, his Chief Deputy; the members of the Board; then Governor Albert P. Brewer, both in his capacity as Governor and in his capacity as a member of the Board; and Judge Perry O. Hooper, Probate Judge of Montgomery County, both individually and as a representative of the class consisting of all probate judges in Alabama.

The complaint alleged that the defendants had effected the staff reductions purely for budgetary reasons; that the discharges of the 99 employees had been accomplished without notice and a hearing, and violated the employees' rights under the due process clause; and that as a result of the discharges the patients at Bryce would not receive adequate treatment. The complaint sought injunctive relief requiring the defendants to insure that treatment programs then being administered at Bryce would not be interrupted or altered, and requiring the defendants to rescind the terminations of the 99 employees.

The original complaint did not allege that treatment levels at Bryce had been inadequate before the terminations. For reasons not entirely clear from the record before us, however, the focus of the litigation soon shifted from the effects of the October 1970 terminations to questions of the overall adequacy of the treatment af-

forded at the Alabama state mental hospitals. On January 4, 1971, the plaintiffs amended the complaint to add prayers that the defendants be enjoined from operating Bryce "in a manner that does not conform to constitutional standards of delivering adequate mental treatment to its patients"; that the Court order defendants to prepare a "comprehensive constitutionally acceptable plan to provide adequate treatment in any state mental health facility"; and that the court declare that patients confined to a state mental health facility are entitled to "adequate, competent treatment".

On March 12, 1971, the district court ruled on the plaintiffs' motion for a preliminary injunction. 325 F.Supp. 781. The court's opinion reflected the shift in the focus of the case. In its opinion, the court declared that patients "involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings" are "committed for treatment purposes" and so "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition". 325 F.Supp. at 784. The court found that the treatment programs in effect before the institution of a staff reorganization then in progress were "scientifically and medically inadequate", failing to "conform to any known minimums established for providing treatment for the mentally ill". *Id.* The court stated that it was not at that time in a position to determine whether the treatment which would be provided after the reorganization was completed would be adequate. Accordingly, the court allowed the defendants ninety days to report progress made in the reorganization plan, and to file with the

Court a "specific plan" for the provision of adequate treatment at Bryce. Also in the March 12 order, the court invited the United States, through the Departments of Justice and Health Education and Welfare, to appear as amicus.

On August 4, 1971, the plaintiffs amended their complaint to allege that the Searcy Hospital at Mount Vernon, Alabama, the one other state hospital for the mentally ill in Alabama, and the Partlow State School and Hospital, Alabama's state facility for the mentally retarded, were being operated in a constitutionally impermissible manner.

On September 13, 1971, six months after the March 12 order, the defendants filed their report on proposed standards of adequate treatment and their implementation. Objections to the report were later filed by the plaintiffs and by the United States, as well as by several interested private organizations which had been granted leave to appear as amici.[3]

The court announced its conclusions upon review of the report and the objections to it in an opinion issued December 10, 1971. 334 F.Supp. 1341. In this opinion, the district court held that there are three "fundamental conditions for adequate and effective treatment": a "humane physical and psychological environment"; qualified

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[3]By order entered August 20, 1971, the district court granted the motion filed by the American Civil Liberties Union, the American Orthopsychiatric Association, the American Psychological Association, and the American Association on Mental Deficiency, for leave to appear as amici. In this Court, these amici have been joined by the National Association for Mental Health and the National Association for Retarded Children. The six have filed a joint brief in this Court.

The district court expressed its gratitude to these organizations for their valuable assistance in this difficult and complex case, 344 F.Supp. 375, 390, and we do so, too.

staff "in numbers sufficient to administer adequate treatment"; and individualized treatment plans. The court held that the reports before it showed "rather conclusively" that the treatment programs at Bryce did not meet any of these conditions. It also noted that conditions at Searcy and Partlow seemed little better. It concluded that the defendants had failed to "formulate minimum medical and constitutional standards for the operation of these institutions". The court scheduled a formal hearing to take evidence necessary to establish standards, and said that after the hearing it, the court, would itself "establish standards and in due course order their implementation".

The court postponed the hearings to give the defendants another opportunity to formulate proposed minimum standards. On January 17, 1972, the parties and *amici* met in Atlanta, Georgia, where they undertook extensive discussions concerning the proper standards of treatment at the Alabama hospitals. Out of these discussions came two Memoranda of Agreement stipulating certain of the standards necessary to define what would constitute minimally adequate mental treatment at a state psychiatric institution. One of the Memoranda covered standards for treatment at the mental hospitals, Searcy and Bryce; the other covered standards to be imposed at the school for the mentally retarded, Partlow. These Memoranda were filed with the district court at the times for the hearings set for determining the proper standards. The hearing concerning Bryce and Searcy was held February 3 and 4, 1972; the hearing concerning Partlow was held February 28–March 2.[4]

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[4]At the conclusion of the Partlow hearing, the district court entered an emergency order requiring the defendants to take certain immediate actions at Partlow. These included the installation of an emer-

The district court announced its orders granting permanent injunctive relief in two opinions issued April 13, 1972. One of the opinions concerned Partlow, the other, *Bryce and Searcy*. 344 F.Supp. 373 (Bryce-Searcy), 390 (Partlow). In Partlow Judge Johnson held that "[b]ecause the only constitutional justification for civilly committing a mental retardate . . . its habilitation, it follows ineluctably" that civilly committed retardates "have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society". The Bryce-Searcy opinion summarized the court's earlier opinions, noting its holding that the civilly mentally ill have a constitutional right to treatment. Beyond this, the two opinions were substantially identical. Both ordered the defendants (1) to implement an elaborate set of standards of treatment set forth in appendices to the opinions; (2) to establish human rights committees at the institutions to review all research and treatment programs "to ensure that the dignity and human rights of the residents are preserved"; (3) to prepare and file reports within six months of the orders on the implementation of the standards; and (4) to pay court costs and a reasonable attorneys' fee to the plaintiffs. The Partlow order

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gency light system and procedures for emergency evacuation; revision of sanitation measures in the kitchen; revamping of its program for the use of drugs; conducting appropriate immunizations; and employing three hundred additional resident care workers. In its order filed March 2, 1972, the court said it was taking these steps "to protect the lives and well-being of the residents", because it found Partlow to be a "warehousing institution . . . wholly incapable of furnishing treatment to the mentally retarded and . . . conducive only to the deterioration and debilitation of the residents", and because it found conditions at Partlow "substandard to the point of endangering the health and lives of the residents".

also required the defendants to hire a qualified administrator for the School within sixty days.[5]

Governor Wallace and the Mental Health Board filed separate notices of appeal May 12, 1972. On May 22, Governor Wallace filed a motion for modification and for a stay pending appeal. On June 1. the district court issued an opinion fixing the amount due plaintiffs as attorneys' fees at $36,744.62. 344 F.Supp. at 408–411. On June 26, the district court denied the motions for modification and for a stay pending appeal. This Court also denied a motion for a stay pending appeal.

B. *The conditions in the Alabama hospitals*

There has not been any significant dispute, in this Court or in the district court, about the conditions that prevailed in the Alabama hospitals at the time this suit was instituted. The defendants have pitched their defense on their argument that the Constitution does not guarantee a right to treatment; they have virtually conceded that if such a constitutional right exists, the conditions in the hospitals were such that the state's constitutional obligation to provide adequate treatment could not be met. There is therefore little reason for an extended discussion of the conditions that prevailed at the hospitals. Some discussion, how-

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[5]In both orders, the court refused requests made by plaintiffs and amici to appoint a master and professional advisory committee to oversee implementation of the standards on grounds that "[f]ederal courts are reluctant to assume control of any organization, but especially one operated by a state". 344 F.Supp. at 377, 392-393. The court also, in both orders, reserved ruling on various motions by the plaintiffs to ensure adequate financing for the implementation of the standards. These included a motion that the Mental Health Board be directed to sell or encumber its extensive land holdings, and a motion for an injunction against the expenditure of state funds on any "non-essential" functions until the standards were fully implemented.

ever, is essential to understanding this case. We therefore note briefly how far short the hospitals fell of meeting the three "fundamental conditions of adequate and effective treatment" defined by the district court.

First, it is clear that the environment at the hospitals was a far cry from the "humane psychological and physical environment" the district court envisioned as *sine qua non* of rehabilitative treatment. Bryce Hospital was built in the 1850's; it had 5000 inmates of whom 1500 to 1600 were geriatrics, 1000 were mental retardates, and there were allegedly other nonmentally ill persons. Patients in the hospitals were afforded virtually no privacy: the wards were overcrowded; there was no furniture where patients could keep clothing; there were no partitions between commodes in the bathrooms. There were severe health and safety problems: patients with open wounds and inadequately treated skin diseases were in imminent danger of infection because of the unsanitary conditions existing in the wards, such as permitting urine and feces to remain on the floor; there was evidence of insect infestation in the kitchen and dining areas. Malnutrition was a problem: the United States described the food as "com[ing] closer to 'punishment' by starvation" than nutrition. At Bryce, the food distribution and preparation systems were unsanitary, and less than 50 cents per day per patient was spent on food. Dr. Donald L. Clopper, Associate Commissioner for Mental Retardation for the Alabama Department of Mental Health, testified that Partlow was a "stepchild" in the State of Alabama; that the physical environment was inadequate for treating inmates; that "we don't have the staff we don't have the facilities, nor do we have the financial resources." According to Dr. Clopper, at least 300 Partlow inmates could

be discharged immediately, and about 70 percent of the inmates should never have been committed; yet it was 60 percent over-crowded. Patients at Partlow were forced to perform uncompensated labor. Aides frequently put patients in seclusion or under physical restraints, including straitjackets, without physicians' orders. One resident had been regularly confined in a straitjacket for more than nine years. The Evaluation Report on Partlow by the American Association on Mental Deficiency stated that nine working residents would feed 54 young boys ground food from one very large bowl with nine plates and nine spoons; "since there were no accommodations to even sit down to eat," it was impossible to tell which residents had been fed and which had not been fed with this system. Seclusion rooms were large enough for one bed and a coffee can, which served as a toilet. The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to understaffing, lack of supervision, and brutality.[6]

The hospitals failed to meet the second condition, adequate staffing. The defendants' chief witness on standards maintained that treatment could be delivered with the ratio of one psychiatrist, one graduate level psychologist, and one masters level social worker for every 125 patients, and the district court ultimately adopted this recommendation. The organizations appearing as amici had recommended higher ratios — one psychiatrist, one

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[6]One of the four died after a garden hose had been inserted into his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured.

psychologist, and one social worker for every 30–50 patients. But at the time this suit was instituted there were ratios of only one medical doctor with some psychiatric training for 5,000 patients, one Ph.D. psychologist for every 1,670 patients, and one masters level social worker for every 2,500 patients at Bryce. The parties and amici agree completely on the minimums necessary for treatment of the mentally retarded. They agreed that adequate treatment could be delivered at Partlow with ratios of one masters level psychologist and one masters level social worker for every sixty patients, and one physician for every two hundred patients. Yet at Partlow there were only one psychologist with masters level training or above for every 1,200 patients; one masters level social worker for every 730 patients; and one physician for every 550 patients. Of the four physicians at Partlow, two were not licensed to practice in Alabama.

A severe shortage of nonprofessional staff paralled the inadequacies of professional staff. After a tour of Bryce, defendants' own consultants noted that:

> Aide staff is spread very thin, creating extreme stresses for individual aides, who at times must cover one or two or three wards, housing as many as 100 or 200 patients. Obviously, it is impossible under such circumstances to provide anything more than a cursory observation and the hope of avoiding disturbing incidents. An aide under these circumstances is hard pressed to meet even minimum patient needs.

The institutional staff was inadequate not only in sheer numbers but also in training; there was no effective "in-service training" program for, or even any regular supervision over, the non-professionals.

Finally, the evidence established that the hospitals

failed to meet the third condition, individualized treatment programs. According to one consultant's testimony, care of patients at Partlow was not suited to the needs of particular individuals, but was instead "geared primarily to housekeeping functions — cleaning floors, cleaning beds, cleaning patients — and to a continuation of work assignments". Experts testified that the patient records kept at the hospital were wholly inadequate; that they were written in such a way as to be incomprehensible to the aide level staff that had prime responsibility for patient care; and that they were kept where they were not accessible to the direct care staff particularly in need of them.

II.

[1, 2] The appellants' first and principal contention on appeal is that the Constitution does not guarantee persons civilly committed to state mental institutions a right to treatment.[7] This contention is largely foreclosed by our

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[7]In raising the issue in this Court, the appellants contend that, because there is no constitutional right to treatment, the district court lacked jurisdiction over the suit. In so arguing the issue, the appellants are following, on this point as one the other four of their first five contentions, the decision of the Northern District of Georgia in Burnham v. Department of Public Health, 1972, 349 F.Supp. 1335, appealed docketed, No. 72-3110, 5 Cir., Oct. 4, 1972. In *Burnham*, the court held that the Constitution does not guarantee a right to treatment. It then held that the consequence of this conclusion was that it was without jurisdiction over the suit, because 28 U.S.C. § 1343(3), the asserted basis of jurisdiction, confers jurisdiction only over "action[s] . . . to redress the deprivation" of a "right, privilege, or immunity" secured by the Constitution or by an Act of Congress providing for equal rights.

Whatever the merits of the question whether the Constitution guarantees a right to treatment, it is clear that it is not proper to treat the question as one affecting the jurisdiction of the district court. It is settled that where the asserted basis of jurisdiction is 28 U.S.C. § 1331(a), which provides jurisdiction over actions "aris[ing]

decision, issued since the institution of this appeal, in Donaldson v. O'Connor, 1974, 493 F.2d 507. In *Donaldson,* we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and for the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others, or the individual's need for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to sell or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty.

Our discussion in *Donaldson,* briefly summarized here, answers most of the arguments made by the appellants on this appeal against the recognition of a constitutional right to treatment. Governor Wallace, however, makes one argument not answered by our discussion in *Donaldson,*

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under the Constitution, laws, or treaties of the United States". "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action". Bell v. Hood, 1946, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939. Rather, jurisdiction must be sustained if "the right . . . to recover . . . will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another". *Id.,* 327 U.S. at 685, 66 S.Ct. at 777. The only exceptions obtain "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous". *Id.,* 327 U.S. a 682-683, 66 S.Ct. at 776. There is no reason why the situation should be any different when the asserted basis of jurisdiction is § 1343(3).

and it is appropriate that we address that argument here. Governor Wallace challenged the assumption, made by the district court in this case and by this Court in *Donaldson*, that the only permissible justifications for confinement are danger to self or others or need for treatment. instead, the Governor suggests, the principal justification for commitment lies in the inability of the mentally ill and mentally retarded to care for themselves. The essence of this argument is that the primary function of civil commitment is to relieve the burden imposed upon the families and friends of the mentally disabled. The families and friends of the disabled, the Governor asserts, are the "true clients" of the institutionalization system.[8]

From this premise the Governor proceeds to the conclusion that is the crux of his argument. If "need for care" is a justification for commitment — or is *the* justification — then it follows that the mere provision of custodial care is constitutionally adequate to justify continued confinement. "[T]he providing of custodial care alone is a tremendously important consideration to patients, their families, and the public-at-large", the Governor writes in his brief.

There are two answers to this line of argument. The

[8] Governor Wallace borrows the term "true clients" from the work of Professor Hugh Goffman. H. Goffman, Asylums—Essays on the Social Situations of Mental Patients and Other Inmates 384 (1961). Governor Wallace in his brief praises Professor Goffman as a "realistic writer". Be that as it may, it is fairly clear that Professor Goffman's intent, in calling "relatives, police, and judges" the "true clients of the mental hospitals" was critical, indeed harshly so, and that Professor Goffman was insinuating by the statement an embarrassing, though rarely admitted, truth about the institutionalization system in the United States. What Professor Goffman implied was morally unacceptable — that the convenience of relatives and law enforcers justifies stripping away all of the liberties of the civilly committed — we hold today is constitutionally unacceptable.

first, and more limited, is that even accepting the Governor's premise that "need for care" is a constitutionally adequate justification for confinement, it does not follow that we must accept the conclusion — that *the kind of care that was provided at the Alabama hospitals* is sufficient to make continued confinement constitutional. The assertion that "need for care" justifies confinement implies that the state has an affirmative obligation to provide a certain minimum quality "care", no less than the assertion that "need for treatment" justifies confinement implies that the state has an affirmative obligation to provide a certain minimum quality "treatment". And it is clear that, however that obligation might specifically be defined, it was not being met in the Alabama hospitals. Dr. Gunnar Dybwad, Professor of Human Development at the Graduate School for Advanced Studies in Social Welfare at Brandeis University, and a one time presidential consultant in the field of mental retardation, made essentially this point when he testified about conditions at Alabama's Partlow State School and Hospital:

> The situation which exists and obviously has existed in Partlow for a long time is one of storage, of persons. I am using that word because *I would not use care,* which involves — has a certain qualitative character, and *I would not even use the word, 'custodial,' because custody, in my term, means safekeeping.* And, as is visible to the visitor at the present time, employees at Partlow are *not in a position to effect safekeeping,* considering the number of people they have to take care of; so I would say it is a storage problem at the moment. (Emphasis supplied.)

Indeed, many of the standards established by the district court in this case — notably those required for what the district court called a "humane psychological and

physical environment" — might have to be met for the state to be able legitimately to claim it was providing adequate "care" to its mental patients. At least where the right to a "humane environment" is concerned, then it is irrelevant whether the right be viewed as a facet of a "right to treatment", or of a "right to care". It is likewise irrelevant for those purposes whether the state interest imputed to the civil commitment system be called the need "to treat" the mentally ill, or the need "to care" for them.

[3] But beyond this, we find it impossible to accept the Governor's underlying premise that the "need to care" for the mentally ill — and to relieve their families, friends, or guardians of the burdens of doing so — can supply a constitutional justification for civil commitment. At stake in the civil commitment context, as we emphasized in *Donaldson*, see 493 F.2d at 520, are "massive curtailments" of individual liberty. Against the sweeping personal interests involved, Governor Wallace would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the "burden" of caring for the mentally ill. The state interest thus asserted may be, strictly speaking, a "rational" state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved.

The other arguments against recognition of a constitutional right to treatment for civilly committed mental patients advanced by the appellants are, as we noted above, answered by our discussion in *Donaldson*. Following *Donaldson*, we hold that the district court here did not err in finding that civilly committed mental patients have a constitutional right to treatment. Our express hold-

ing in *Donaldson* and here rests on the *quid pro quo* concept of "rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." 493 F.2d at 522.

III.

[4] The second, third, fourth, and fifth issues raised by the appellants are also substantially affected by our decision in *Donaldson*, and present little difficulty except as to some aspects of remedy which will be discussed in Part IV, infra. The argument that this suit is barred by the eleventh amendment is based largely upon Burnham v. Department of Public Health, N.D.Ga.1972, 349 F.Supp. 1335, appeal docketed, No. 72–3110, 5 Cir., Oct. 4, 1972, a case consolidated for argument on appeal with this case. In *Burnham* the court held that, because the right to treatment was a right arising only, if at all, under state law, a suit by citizens of the state against state officials to enforce the right was barred by the eleventh amendment. Our holding in *Donaldson*, however, vitiates this argument, of course, for we have now established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment.

[5] In *Donaldson*, we addressed and rejected the argument that a constitutional right to adequate treatment would present questions not susceptible to "judicially manageable or ascertainable standards". We held that the judiciary was competent to determine, at least in individual cases, whether psychiatric treatment was medically or constitutionally adequate. And we said in dictum that even in cases such as this one, "when courts are asked to

undertake the more difficult task of fashioning institution-wide standards of adequacy", 493 F.2d at 526, the courts would be able to formulate workable standards. In *Donaldson*, we took note of the substantial agreement reached in this case among parties and *amici* in developing standards during the course of the proceedings in the lower court. We cited that development as evidence supporting our view that workable standards could be fashioned. We remain mindful of that development here, in reaffirming our belief that the right to treatment can be implemented through judicially manageable standards.

[6] The appellants' fourth contention is that the order of the district court invades a province of decision-making exclusively reserved for the state legislature. Governor Wallace argues that the order will require heavy expenditures of state funds; that these funds will have to come from other state programs; and that the duty of compromising and allocating funds among the many programs competing for them is a duty which must be discharged by the state governor and legislature alone. Governor Wallace concedes in his brief that he is not contending that "the financial cost of complying with an established constitutional right is a valid reason for failure to comply". He "suggest[s] that before the Court decides to adopt a new constitutional right it should consider all of the consequences of its action, financial and social, and its effect on our federal form of government". The Mental Health Board makes the point in a related way, by suggesting that the district court's order here is in effect an order requiring the state to furnish a particular service, and by citing cases establishing the general proposition that ordinarily it is not for the federal courts to say whether or in what amounts a state shall provide any particular govern-

ment benefit or service. *E. g.*, Fullington v. Shea, D.Colo. 1970, 320 F.Supp. 500, aff'd, 404 U.S. 963, 92 S.Ct. 345, 30 L.Ed.2d 282.

We find these arguments unpersuasive. It goes without saying that state legislatures are ordinarly free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. And it is the essence of our holding, here and in *Donaldson*, that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations". Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571, 580 (Blackmun, J.), quoted, Rozecki v. Gaughan, 1 Cir. 1972, 459 F.2d 6, 8. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights". Hamilton v. Love, E.D.Ark.1972, 328 F.Supp. 1182, 1194. "[T]he obligation of the Respondents [prison officials] to eliminate unconstitutionalities does not depend upon what the Legislatures may do". Holt v. Sarver, E.D.Ark.1970, 309 F. Supp. 362, 385, aff'd, 8 Cir. 1971, 442 F.2d 304. See also Hawkins v. Town of Shaw, 5 Cir. 1971, 437 F.2d 1286, 1292.

This conclusion is not novel. In the context of state penal institutions, the federal courts have repeatedly intervened to assure that the conditions of confinement do

not invade the constitutional rights of those confined. *E. g.*, Cruz v. Beto, 1972, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263; Johnson v. Avery, 1968, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718; Campbell v. Beto, 5 Cir. 1972, 460 F.2d 765; Landman v. Royster, E.D.Va.1971, 333 F.Supp. 621; Holt v. Sarver, E.D.Ark.1970, 309 F.Supp. 362, aff'd, 8 Cir. 1971, 442 F.2d 304. This Court has recognized that "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of federal constitutional limitations". *Campbell*, 460 F.2d at 767–768. In discharging these duties, the federal courts have in some cases entered decrees requiring substantial restructuring of state prison systems, but the courts have not hesitated to enter such decrees when necessary to safeguard the constitutional rights of prisoners. As the court said in Holt v. Sarver:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

309 F.Supp. at 385.

Similar developments have occurred in the field of institutions for the detention of juveniles. Nelson v. Heyne, 7 Cir. 1974, 491 F.2d 352, aff'g, N.D.Ind. 1972, 355 F.Supp. 451; Martarella v. Kelley, S.D.N.Y.1972, 359 F.Supp. 479, enforcing, 349 F.Supp. 575; Inmates of Boys' Training School v. Affleck, D.R.I.1972, 346 F.

Supp. 1354; Morales v. Turman, E.D.Tex.1973, 364 F.Supp. 166.

[7] The appellants' fifth contention, that the plaintiffs had adequate remedies at law, is also unpersuasive. In the *Burnham* case, the court held that the legal remedies of "habeas corpus, medical malpractice, and ordinary tort actions" would supply adequate remedies to mental patients who claimed to have been denied a right to treatment. 349 F.Supp. at 1343. It found the plaintiffs' arguments to the contrary "inconsistent with plaintiffs argument that each individual patient should have his particular therapy or treatment personalized". *Id.* Governor Wallace and the Mental Health Board urge here the argument that damage and habeas corpus actions provide adequate legal remedies to the plaintiffs. They also point to the plaintiffs' argument that treatment must be individualized, and to the tension between that argument and the plaintiffs' insistence that injunctive relief on behalf of the plaintiff class is appropriate in this case.

We are unable to agree that injunctive relief is inappropriate merely because damages or habeas corpus relief may be available to some or all individual plaintiffs. While habeas corpus and tort remedies should play a valuable, indeed essential, role in enforcing the constitutional rights we recognized in *Donaldson*, those remedies are not capable of ensuring what the plaintiffs seek to ensure in this case. In the first place, habeas corpus relief and tort damages are available only after the fact of a failure to provide individual treatment. Here the plaintiffs seek preventive relief, to assure in advance that mental patients will at least have the *chance* to receive adequate treatment by proscribing the maintenance of conditions that foredoom *all* mental patients *inevitably* to inadequate

mental treatment. Moreover, there are special reasons why reliance upon individual suits by mental patients would be especially inappropriate. Mental patients are particularly unlikely to be aware of their legal rights. They are likely to have especially limited access to legal assistance. Individual suits may be protracted and expensive, and individual mental patients may therefore be deterred from bringing them. And individual suits may produce distortive therapeutic effects within an institution, since a staff may tend to give especially good — or especially harsh — treatment to patients the staff expects or knows to be litigious.[9]

We see no inconsistency between this conclusion and the position taken by the plaintiffs, and by the district court, that treatment must be individualized. The plaintiffs here do not seek to *guarantee* that all patients will receive all the treatment they need or that may be appropriate to them. They seek only to ensure that conditions in the state institutions will be such that the patients confined there will have a *chance* to receive adequate treatment. This requires only the establishment of a program, institution-wide in scope, for developing and formulating individual treatment plans; it of course does not require the formulation, in this suit, of each individual plan. The question of what is necessary to the establishment of such a program is better resolved in a class action brought on behalf of all patients than it would be in a series of individual suits.

IV.

We pretermit decision as to the remedy decreed by the district court to the extent herein stated. As we have held,

[9]See 86 Harv.L.Rev. 1282, 1305 (1973).

the legislative power may not be used to deprive appellees of their constitutional right to treatment, but a substantial question is presented as to the scope of judicial power in implementing this right. The ultimate question will be, if all else fails, the method of effecting the financial outlay which will be necessary for the judiciary to give meaning to judicially prescribed minimum constitutional standards for adequate treatment of the mentally ill.

Prior to the entry of the court's orders on April 13, 1972, 344 F.Supp. 373; 344 F.Supp. 387, the parties and amici stipulated to a number of specific conditions they agreed were necessary for a constitutionally acceptable minimum treatment program.[10] Because of these stipulations, we need not and do not reach decision as to whether the standards prescribed by the district court are constitutionally minimum requirements, or whether it is within the province of a federal district court, three-judge or single judge, to prescribe standards as distinguished from enjoining the operation of such institutions while constitutional rights are being violated.

[8] Governor Wallace contends such stipulations are not binding on him or the Alabama legislature. As a party to the stipulations, through counsel, we hold the Governor has for his part agreed that these standards are minimally acceptable under the Constitution. The Alabama legisla-

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[10]The parties and amici submitted in two Memoranda of Agreement stipulations of standards of adequate care. Virtually all of the specifics of the district court's April 13, 1972 orders were taken from these stipulations. These standards have not been challenged on appeal. Indeed, Governor Wallace's brief to this court begins with the affirmation: "We wish to emphasize at the outset that this appellant, Governor George C. Wallace, is in full and complete agreement with the ultimate achievement of the standards and goals for mental health facilities which are set forth in the District Court's order[s] of April 13, 1972." Brief of Appellant, p. 1.

ture presents a different problem. Clearly the Governor is without authority to agree to the expenditure of funds required to implement such a broad spectrum of standards when such a decision under Alabama law is reserved to the legislature. That the legislature was not a party to the stipulations in question or to this law suit reenforces this manifest principle of governmental organization. It is the Governor's role to propose relief to the legislature and, having stipulated the standards, to use his best efforts to accomplish the relief.

With respect to judicial accomplishment of the remedy, profound questions are presented regarding the scope of substantive due process and the role of federal courts in matters affecting the management of state institutions. Here we are concerned with the operation of state mental institutions within the parameters of substantive due process.[11]

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[11]As noted, supra, however rare they may be, federal decrees mandating affirmative action expenditures by state governing authorities to ensure constitutional guarantees are not unprecedented in cases involving equal protection and also cruel and unusual punishment. *E.g.*, Griffin v. County School Bd., 1964, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256, 266; Swann v. Charlotte-Macklenburg Bd. of Educ., N.D.N.C., 1970, 311 F.Supp. 265, 268, vacated and remanded on other grounds, 4 Cir. (en banc), 431 F.2d 138, order reinstated, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; United States v. Plaquemines Parish School Bd., E.D.La., 1967, 291 F. Supp. 841, aff'd as modified, 5 Cir., 1969, 415 F.2d 817; Cruz v. Beto, 1972, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263; Holt v. Sarver, 8 Cir., 1971, 442 F.2d 304; Nelson v. Heyne, 7 Cir., 1974, 491 F.2d 352; Gautreaux v. Chicago Housing Auth., N.D.Ill.1969, 296 F.Supp. 907, aff'd, 7 Cir., 1970, 436 F.2d 306, cert. denied, 1971, 402 U.S. 922, 91 S.Ct. 1378, 28 L.Ed.2d 661.

See also cases cited Note, Right to Treatment, 1973, 86 Harv.L. Rev. 1282, 1300, nn. 98-104; Developments in the Law, Civil Commitment of the Mentally Ill, 1974, 87 Harv.L.Rev. 1190, 1398, n. 6; Comment, Enforcement of Judicial Financing Order; Constitutional Rights in Search of a Remedy, 1970, 59 Geo.L.J. 393.

[9] The Governor argues that the prescribed remedy will entail the expenditure annually of a sum equal to sixty per cent of the state budget excluding school financing, and a capital improvements outlay of $75,000,000. This is contested by appellees. However that may be, we regard as premature any issue as to whether the district court should appoint a Special Master for the purposes of selling or encumbering state lands to finance these standards, or should enjoin certain state officials from authorizing expenditures for nonessential state functions, and thereby alter the state budget, or by other means order a particular mode of financing the implementation of the stipulated standards.

Such remedial propositions are by the terms of the district court's April 13, 1972 not present orders; they lie in the uncertain future. The district court wrote:

> ". . . this Court has decided to reserve ruling also upon plaintiffs' motion that defendant Mental Health Board be directed to sell or encumber portions of its land holdings in order to raise funds. Similarly, this Court will reserve ruling on plaintiffs' motion seeking an injunction against the treasurer and the comptroller of the State authorizing expenditures for nonessential State functions, and on other aspects of plaintiffs' requested relief designed to ameliorate the financial problems incident to the implementation of this order. . . . The responsibility for appropriate funding ultimately must fall, of course, upon the State Legislature and, to a lesser degree, upon the defendant Mental Health Board of Alabama. For the present time, the Court will defer to those bodies in hopes that they will proceed with the realization and understanding that what is involved in this case is not representative of ordinary governmental functions such as paving roads and maintain-

> ing buildings. Rather, what is so inextricably intertwined with how the Legislature and Mental Health Board respond to the revelations of this litigation is the very preservation of human life and dignity . . .
>
> In the event, though, that the Legislature fails to satisfy its well-defined constitutional obligation, and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized and that adequate treatment is available for the mentally ill in Alabama." 344 F.Supp. at 377–378. See also 344 F.Supp. at 393–394. (These separate orders cover the three institutions involved.)

To the latter statement, the district court added in a footnote, 344 F.Supp. at 378, n. 8:

> "The Court understands and appreciates that the Legislature is not due back in regular session until May, 1973. Nevertheless, special sessions of the Legislature are frequent occurrences in Alabama, and there has never been a time when such a session was more urgently required. If the Legislature does not act promptly to appropriate the necessary funding for mental health, the Court will be compelled to grant plaintiffs' motion to add various State officials and agencies as additional parties to this litigation, and to utilize other avenues of fund raising." See also 344 F. Supp. at 394, n. 14.

The district court ordered that defendants file within six months a detailed report on the implementation of the stipulated standards.

The serious constitutional questions presented by federal judicial action ordering the sale of state lands, or

altering the state budget, or which may otherwise arise in the problem of financing, in the event the governing authorities fail to move in good faith to ensure what all parties agree are minimal requirements, should not be adjudicated unnecessarily and prematurely. *See* Ashwander v. Tennessee Valley Authority, 1936, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688, 710–712 (Brandeis, J., concurring); *cf.* Hawkins v. Town of Shaw, 5 Cir. (en banc), 1972, 461 F.2d 1171; Holt v. Sarver, 8 Cir., 1971, 442 F.2d 304, 309. Since we have now affirmed that part of the district court's orders recognizing the constitutional right to treatment, determination of good faith efforts by state authorities to ensure these rights should be made in the first instance in the district court.

[10] In any event, as a jurisdictional matter dictated by federal statute, remedies of the type contemplated in the district court order of April 13, 1972 are required to be determined by a district court of three judges. Any federal decree that state lands be sold or legislative appropriations be reallocated or enjoined would involve state laws of statewide significance within the purview of 28 U.S.C.A. § 2281. The federal injunctive decree which might be entered in such circumstances is required to be that of a three-judge district court. Sands v. Wainwright, *supra,* 491 F.2d 417. We of course make no prejudgment as to the appropriateness of any such remedial order. Moreover depending on the improvements made or in progress, such remedies may be unnecessary.

This court views as serious a state's failure to ensure the fulfillment of appellees' constitutional rights, but the interests of all concerned, and the sensitivities of our federal system, will be best served by the parties, amici,

and court moving together to meet the constitutional requisites. This is the nature of the remedy ordered by this court in Hawkins v. Town of Shaw, *supra*, 461 F.2d at 1174. This appears to be the meaning and intent of the district court's recognition of the function of the Alabama legislature within the Alabama governmental framework, and the court's orders of April 13, 1972 requiring reports on compliance with the stipulated standards.

This approach should hasten the day when the district court can be reasonably assured that appellees' constitutional rights are no longer being violated, and when ultimate control over the institutions in question can be returned to the state. *Cf.* Holt v. Sarver, *supra*, 442 F.2d at 309.

V.

We reserve decision on the issue presented by the awards of attorneys' fees to plaintiffs pending decision in No. 73–1790, Gates v. Collier; No. 73–2033, Newman v. State of Alabama; and Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, en banc, argued and submitted on October 2, 1974. See 28 U.S.C.A. § 2106 for the authority to reserve decision.

Affirmed in part; remanded in part for further proceedings not inconsistent herewith; and decision reserved in part.